Supreme Court, U.S.
FILED
94 429 SEP 8 1994
OFFICE OF THE CLERK

No. ____

# In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT E. ASHNESS,
PETITIONER,

*v.*

FIRST BANK AND TRUST COMPANY,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

JAMES P. MARUSAK
GIDLEY, SARLI & MARUSAK
*Attorney for Petitioner*
170 Westminster Street, Suite 500
Providence, RI 02903
(401) 274-6644

Blanchard Press, Inc., Boston, Mass — Law Printers (617) 426-6690

## QUESTION PRESENTED

SHOULD CERTIORARI ISSUE:

(A) WHERE THE RHODE ISLAND SUPREME COURT ERRONEOUSLY DECLARED THAT THE RESPONDENTS' DUE PROCESS RIGHTS WERE VIOLATED EVEN THOUGH THE RESPONDENT RECEIVED ACTUAL NOTICE OF JUDICIAL FORECLOSURE PROCEEDINGS BUT FAILED TO APPEAR; AND

(B) WHERE THE RHODE ISLAND SUPREME COURT ERRONEOUSLY DECLARED THAT SUCH ACTUAL NOTICE WAS INSUFFICIENT BASED UPON A MISINTERPRETATION OF THIS COURT'S DECISION IN *Mennonite Board of Missions* v. *Adams*?

## LIST OF PARTIES TO THE PROCEEDING IN THE RHODE ISLAND SUPREME COURT

1. Robert E. Ashness (Appellant below and Petitioner herein)

2. First Bank and Trust Company (Appellee below and Respondent herein)

3. Jeffrey Pine, Attorney General of the State of Rhode Island (notified pursuant to statute, but declined to intervene below.)

NOTE: All other parties to the original proceeding in the Rhode Island Superior Court were not party to the Rhode Island Supreme Court appeal. Those parties included Joyce Tomasetti (mortgagor and defaulted fee holder), Suburban Land Company (former tax lien holder); M & L Management, Inc., Sophie Kosty, Martin P. Slepkow and Milton S. Slepkow, Trustees of the Slepkow, Slepkow and Bettencourt, Inc. pension plan (defaulted secondary mortgagees). Out of an abundance of caution, counsel has sent notice to the last known addresses of all such parties advising of the pendency of this petition and of counsel's belief that they are no longer interested parties.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | I |
| LIST OF PARTIES TO THE PROCEEDING IN THE RHODE ISLAND SUPREME COURT | II |
| TABLE OF AUTHORITIES | V |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR ALLOWING THIS REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI | 7 |
| A. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND IMPROPERLY DECIDED AN IMPORTANT FEDERAL QUESTION. R.I.G.L. § 46-21-52 Does Not Violate Due Process Mandates | 8 |
| 1. *R.I.G.L. § 46-21-52 Applies* in pari materia *with R.I.G.L. § 44-9-27 Assuring Timely Notice to Mortgagees* | 8 |
| 2. *The "Sewer Charge Sale" Stage of the Proceedings Was Not an Event Requiring Notice to the Mortgagee* | 9 |
| 3. *Actual and Proper Notice was Provided to the Respondent* | 10 |
| B. THE DECISION BELOW ERRONEOUSLY DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH CORRECT DECISIONS OF ANOTHER STATE COURT OF LAST RESORT | 11 |
| 1. *The Illinois Tax-Sale Mechanism is Most Analogous and Has been Upheld by Both the Illinois Courts and This Court* | 11 |
| 2. Mennonite *Does Not Invalidate the Rhode Island/Illinois Tax Sale Model* | 12 |

C. THE RESPONDENT'S ALLEGED DUE PROCESS RIGHT TO MAILED NOTICE AT THE SEWER SALE STAGE IS INAPPLICABLE, ABSENT AN ACTUAL DEPRIVATION OF PROPERTY FLOWING DIRECTLY FROM SUCH LACK OF NOTICE ..... 13
D. THE RHODE ISLAND SUPREME COURT INTERPRETATION OF THE *MENNONITE* DECISION WORKS BOTH AN ABSURD AND ONEROUS RESULT ..... 15
CONCLUSION ..... 16

## APPENDICES

Appendix A — Petition to Foreclose Equity of Redemption dated November 20, 1991 ..... A-1
Appendix B — Certificate of Notice to First Bank delivered November 22, 1991 ..... A-3
Appendix C — Pertinent Portions of Superior Court Transcript dated April 27, 1993 ..... A-4
Appendix D — Judgment of Superior Court, Gagnon, J., dated May 4, 1993 ..... A-6
Appendix E — Opinion of the Supreme Court of the State of Rhode Island dated June 22, 1994 ..... A-8
Appendix F — Relevant Rhode Island Statutes in order of appearance:
1. R.I.G.L. § 46-21-52 ..... A-26
2. R.I.G.L. § 44-9-27 ..... A-26
3. R.I.G.L. § 44-9-30 ..... A-27
4. R.I.G.L. § 44-9-12 ..... A-27
5. R.I.G.L. § 44-9-31 ..... A-28
6. R.I.G.L. § 44-9-28 ..... A-29
7. R.I.G.L. § 44-9-11 ..... A-29
8. R.I.G.L. § 46-21-23 ..... A-30
Appendix G — Superior Court Stay of Execution dated August 4, 1994 ..... A-31

## TABLE OF AUTHORITIES

### CASES

*United States Supreme Court Cases*

Page

*Asarco* v. *Kadish*, 490 U.S. 605, 104 L.Ed.2d 696, 109 S.Ct. 2037 (1989) ..... 6

*Balthazar* v. *Mari, Ltd.*, 301 F.Supp. 103, Aff'd (1969), 396 U.S. 114, 90 S.Ct. 397, 24 L.Ed.2d 307 2, 12

*Catoor* v. *Blair*, 358 F.Supp. 815, *Aff'd* (1973), 414 U.S. 990, 94 S.Ct. 345, 38 L.Ed.2d 231 ..... 2, 13

*Delaware* v. *Prouse*, 440 U.S. 648, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979) ..... 6

*Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 61 L.Ed. 644, 37 S.Ct. 318 (1917)..... 8

*Harris* v. *Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)..... 17

*International Longshoremen's Ass'n.* v. *David*, 476 U.S. 380, 90 L.Ed.2d 389, 106 S.Ct. 1904 (1986).. 8

*Kentucky* v. *Stincer*, 482 U.S. 730, (1987) ..... 6

*McCoy* v. *Shaw*, 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928)..... 8

*McCullough* v. *Virginia*, 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed. 382 (1898)..... 8

*Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) 2, 5, 9, 10, 12, 13

*Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), on remand 417 Mich 1145, later op. 413 Mich. 636, 359 N.W.2d 194 ..... 6, 7

*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). 2, 9, 10

Page

*Oregon* v. *Kennedy*, 456 U.S. 667, 72 L.Ed.2d 416, 102 S.Ct. 2083 (1982) ..... 8

*Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924) ..... 17

*Rosewell* v. *Chicago Title and Trust Company*, 459 N.E.2d 966 (Ill. 1984), appeal dismissed *sub. nom. Blum* v. *Rosewell*, 467 U.S. 1237, 104 S.Ct. 3503, 81 L.Ed. 813 (1984) ..... 2, 11, 12, 14

*San Diego Bldg. Trades Council* v. *Garmon*, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed.2d 618 (1957), *pet. den.* 353 U.S. 951, 77 S.Ct. 858, 1 L.Ed.2d 860 (1957), *motion den.* 354 U.S. 919, 77 S.Ct. 1374, 1 L.Ed. 2d 1434, (1957), *and on remand* 49 Cal. 2d 595, 320 P.2d 473 (1957), *rev'd on other grounds* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 1434 (1959) ..... 16

*Williams* v. *Bruffy*, 102 U.S. 248, 26 L.Ed. 135 (1880) 7

*Zacchini* v. *Scripps Howard Broadcasting Co.*, 433 U.S. 562, 53 L.Ed.2d 965, 97 S.Ct. 2894 (1977) ... 6

*Rhode Island Cases*

*Ashness* v. *Burr's Lane Associates*, 640 A.2d 522 (R.I. 1994) ..... 5, 9, 10, 14

*Ashness* v. *Joyce Tomasetti, et al.*, ____ A.2d ____ (R.I. Slip Op. June 22, 1994) ..... 1, 2, 4, 5, 6, 15

*Brennan* v. *Kirby*, 529 A.2d 633 (R.I. 1987) ..... 16

*Driscoll* v. *Karoo Land Company, Inc.*, 600 A.2d 722 (R.I. 1991) ..... 14

*Hashway* v. *Shawmut Bank of R.I.*, 615 A.2d 1061 (R.I. 1992) ..... 5, 13, 14

*Weaver* v. *Arnold*, 15 R.I. 53, 23 A.41 (R.I. 1885) .. 9

## STATUTORY PROVISIONS AND THE CONSTITITION OF THE UNITED STATES


| | Page |
|---|---|
| Amendment 14 to the Constitution of the United States | 2, 16 |
| 28 U.S.C. 1257(a) | 1, 8, 17 |
| Rule 10.1(b), Rules of the Supreme Court of the United States | 2, 13 |
| Rule 10.1(c), Rules of the Supreme Court of the United States | 2, 10 |
| R.I.G.L. §44-9-11 | 6 |
| §44-9-12 | 10 |
| §44-9-27 | 3, 8, 9, 10, 13, 15 |
| §44-9-28 | 6 |
| §44-9-30 | 4, 6, 15 |
| §44-9-31 | 5, 15 |
| §46-21-22 | 10 |
| §46-21-23 | 8 |
| §46-21-52 | *passim* |

# In the
# Supreme Court of the United States

OCTOBER TERM, 1995

No. _____

ROBERT E. ASHNESS,
PETITIONER,

*v.*

FIRST BANK AND TRUST COMPANY,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Rhode Island which is in direct controversy, *Robert E. Ashness* v. *Joyce Tomasetti, et al.*, ____ A.2d ____ (R.I. Slip Op. June 22, 1994), is reprinted herein as **Appendix E.**

The bench decision of the Rhode Island Superior Court reviewed by the Rhode Island Supreme Court in *Ashness* v. *Tomasetti* was rendered on April 27, 1993. A transcript of the relevant portions thereof is reprinted as **Appendix C.**

The Judgment of the Superior Court dated May 4, 1993 is reprinted as **Appendix D.**

## JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(a). This Petition seeks review, by way of issuance of a

writ of certiorari, of a decision of the Supreme Court of Rhode Island entitled *Robert E. Ashness* v. *Joyce Tomasetti, et al.*, ____ A.2d ____ (R.I. Slip Op. June 22, 1994) (attached as **Appendix E**). That opinion erroneously held that a statute of the State of Rhode Island, R.I.G.L. § 46-21-52, violated the due process mandates of the Fourteenth Amendment of the Constitution of the United States of America. In doing so, the court below deprived the Petitioner of significant property interests obtained according to law.

Jurisdiction is also appropriate pursuant to United States Supreme Court Rules 10.1(b) and (c) in that the Rhode Island Supreme Court, the highest court in the state, has decided an important federal question in a way that conflicts with decisions of another state court of last resort (Illinois), *see Rosewell* v. *Chicago Title and Trust Company*, 459 N.E.2d 966 (Ill. 1984), appeal dismissed *sub. nom. Blum* v. *Rosewell*, 467 U.S. 1237, 104 S.Ct. 3503, 81 L.Ed. 813 (1984), and with applicable decisions of this Court. *See Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983); *Mullane* v. *Central Hanover Bank and Trust*, 339 U.S. 306 (1950), 70 S.Ct. 652, 84 L.Ed. 865; *Blum* v. *Rosewell, supra; Balthazar* v. *Mari Ltd.*, 301 F.Supp. 103 *aff'd* (1969), 396 U.S. 114, 90 S.Ct. 397, 24 L.Ed.2d 307; *Catoor* v. *Blair*, 358 F.Supp. 815, *aff'd* (1973), 414 U.S. 990, 94 S.Ct. 345, 38 L.Ed.2d 23.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner challenges the Decision of the Rhode Island Supreme Court which found a state statute, R.I.G.L. § 46-21-52 (**Appendix F-1**), repugnant to a portion of Section 1 of the 14th Amendment to the Constitution of the United States, to wit:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

On May 18, 1990, Joyce Tomasetti obtained title to real estate located at 640-642 Pine Street, Central Falls, Rhode Island. Tomasetti later failed to pay assessed municipal taxes and sewer charges. Consequently, on June 4, 1990, the Central Falls Tax Collector held a tax sale. A mortgagee, the respondent First Bank and Trust (hereinafter **"the bank"**), was properly notified of the tax sale by certified mail, but failed to take any action. A tax deed was then conveyed to Suburban Land Company.

On October 12, 1990 a sewer authority, the Blackstone Valley District Commission, held a sewer charge "sale" for delinquent sewer fees. In accordance with Rhode Island General Law (hereinafter "R.I.G.L.") 46-21-52, the Commission notified Ms. Tomasetti and Suburban. R.I.G.L. 46-21-52 does not require mailed notice to mortgagees **at that stage.** (See **Appendix F-1.**) On the date of the Blackstone Valley District Commission sale, the bank had not redeemed the tax sale title which was purchased by Suburban. The Petitioner, Robert Ashness (hereinafter "Ashness") was the purchaser at the sewer charge "sale."

On November 20, 1991, Ashness, pursuant to Title 44, Chapter 9 of the Rhode Island General Laws, filed a petition in Superior Court to foreclose all rights of redemption resulting from the sewer charge sale. (See **Appendix A.**) Pursuant to R.I.G.L. 44-9-27, Ashness notified the necessary parties, **including the bank,** by certified mail. Subsection (a) of that statute, in pertinent part, requires a petitioner seeking to foreclose the right of redemption to

> . . . notify all persons appearing to be interested [in the title], whether as equity owners, **mortgagees,** lienors,

> attaching creditors, or otherwise, of the pendency of the petition, the notice to be sent to each by registered or certified mail and return of receipt required. Such other and further notice by publication or otherwise shall be given as the court may at any time order [Emphasis added.] **(Appendix F-2.)**

The bank received the notice but failed to appear or seek equitable redemption within the statutory period. (Certificate of Notice attached as **Appendix B.**) On January 9, 1992, the Superior Court entered default judgment against the duly notified bank and others, vesting title in Ashness and "forever barring" the bank's redemption interest pursuant to Rhode Island General Law 44-9-30 **(Appendix F-3).**

The bank subsequently moved for relief from default judgment on the basis of "excusable" neglect. That motion was **denied** by the Superior Court on June 18, 1992. No appeal was taken from that decision.

On January 6, 1993, the bank **again** challenged the Petitioner's Judgment which had entered almost one year earlier, this time espousing constitutional "notice" issues. *See, Ashness* v. *Tomasetti, infra* **(Appendix E** at pp. 7-8). On April 27, 1993, Justice Ronald Gagnon of the Rhode Island Superior Court granted First Bank and Trust's second motion for relief from default judgment finding R.I.G.L. 46-21-52 to be unconstitutional on due process grounds even though the Bank had been notified of the action which foreclosed the equity of redemption. *(See* pertinent portions of transcript attached as **Appendix C.)**

A judgment of the Superior Court was entered accordingly on May 4, 1993 **(Appendix D).** Ashness filed a timely appeal to the Rhode Island Supreme Court on May 11, 1993.

On June 22, 1994, after full briefing and argument of the federal constitutional issues, the Supreme Court of the State of Rhode Island, the highest court in the state, issued its opinion, *Robert E. Ashness* v. *Joyce Tomasetti, et al.*, ____ A.2d ____ (R.I. Slip Op. June 22, 1994) **(Appendix E).**

In rendering its decision, the Rhode Island Supreme Court erroneously and heavily relied on the holding of this Court in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), a case which declared a clearly distinguishable Indiana statute as violative of federal due process notice mandates. *See Ashness* v. *Tomasetti* (**Appendix E**, pp. 17-20.). Although the Rhode Island Supreme Court acknowledged the differences in the statutory framework, it found the *Mennonite* decision "broad enough that it applies equally to our statute." *Id.* at P. 19.

In Rhode Island, although a sewer sale deed passes at the time a purchaser at a sewer fee sale pays the delinquent charges, the deed is severely restricted. Unrestricted fee does not vest in such a purchaser until the Court, after notice, has foreclosed all rights of redemption at least one year after the sale. The Supreme Court of Rhode Island has found that the "operative statute" controlling sewer charge and tax sales is R.I.G.L. § 44-9-12 (**Appendix F-4**). *See Ashness* v. *Burr's Lane Associates*, 640 A.2d 522 (R.I. 1994). R.I.G.L. § 44-9-12, in pertinent part, states

> . . . no sale hereafter made shall give to the purchaser any right to either possession, or the rents or profits of the land until the expiration of one year after the date of sale . . . until the right of redemption is foreclosed.

Significantly, the state Supreme Court has also determined that a mere tax sale does not effect the priority of a mortgage at all. *Hashway* v. *Shawmut Bank of R.I.*, 615 A.2d 1021 (R.I. 1992).

Furthermore, R.I.G.L. § 44-9-31 provides in pertinent part that

> If a person claiming an interest desires to raise any question concerning the validity of a tax title, the person should do so by an answer filed in the proceeding . . . or else be forever barred from contesting or raising the question in any other proceeding. (**Appendix F-5**)

A party is statutorily given 20 days after notice of the petition to foreclose within which to file an answer. R.I.G.L. § 44-9-28 **(Appendix F-6).**

In the event that a party notified of a proceeding to foreclose the equity of redemption fails to redeem

> a decree shall be entered which shall forever bar all rights of redemption. [R.I.G.L. § 44-9-30.] **(Appendix F-3).**

The Rhode Island Supreme Court below however found that a supplemental notice to mortgagees applicable in municipal tax sales (R.I.G.L. § 44-9-11) **(Appendix F-7)** was also required in the sewer fee sale process. The court did so on federal constitutional grounds, incorrectly assuming that the notice of the sewer fee sale

> did not comport with constitutional guarantees of due process with regard to the mortgagees and therefore we determine that the sale is void. *Ashness* v. *Tomasetti, supra,* **Appendix E** at p.21.

Accordingly there is no "independent" or "adequate" state ground upon which the opinion below rested. *See Michigan* v. *Long,* 463 U.S. 1032, 77 L.Ed.2d 1201; 103 S.Ct. 3469 (1983) (no "independent" state ground where state law interpretation is based on perceived federal law violation). *See also Kentucky* v. *Stincer,* 482 U.S. 730, 735 n.7, 53 L.Ed. 965; 97 S.Ct. 2849 (1987); *Asarco* v. *Kadish,* 490 U.S. 605, 625, 104 L.Ed.2d 696, 109 S.Ct. 2037 (1989); *Zacchini* v. *Scripps Howard Broadcasting Co.,* 433 U.S. 562, 568, 53 L.Ed.2d 965, 97 S.Ct. 2894 (1977) (no "adequate" state law ground where state court felt compelled by its interpretation of federal constitutional considerations to construe state law as it did). *See also Delaware* v. *Prouse,* 440 U.S. 648, 653, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979).

After the Rhode Island Supreme Court affirmed the judgment of the Superior Court, it remanded the papers of the case to the Superior Court.

The respondent bank then advertised a foreclosure sale of the subject property which was originally scheduled for August 11, 1994. On or about August 4, 1994, the Superior Court, by agreement of the parties, issued a stay of execution pending the decision of this Court relative to the issuance of a writ of certiorari **(Appendix G)**.

The petitioner filed this petition for relief by way of certiorari within the 90-day period provided by Rule 13 of the Rules of the United States Supreme Court.

As argued more fully below, the Petitioner now requests that certiorari issue as the Rhode Island Supreme Court incorrectly held R.I.G.L. § 46-21-52 to be unconstitutional based directly upon a clear misreading of various pronouncements of this Court concerning "due process" mandates.

## REASON FOR ALLOWING THIS REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI

The jurisdiction of the United States Supreme Court traditionally attaches when the highest court of a state affirms or denies the validity of a judgment of an inferior court on appeal provided that a federal question is involved. *Williams* v. *Bruffy*, 102 U.S. 248, 26 L.Ed. 135 (1880).

In the present case, the highest state court in Rhode Island, on appeal, affirmed the decision of an inferior trial court based squarely upon a crucial question of federal constitutionality. In cases such as this where there is a strong indication that judicial construction of the federal constitution controlled the state court decision, review by the United States Supreme Court is warranted. *Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), on remand 417 Mich. 1145, later op. 413 Mich. 636, 359 N.W.2d 194. This procedure for review is in keeping with the proven practice of this Court to look to the "real substance and effect" of the state

court decision in determining whether the matter is reviewable on federal question grounds. *See McCullough* v. *Virginia*, 172 U.S. 102, 19 S.Ct. 134, 43 L.Ed. 382 (1898).

An allegedly independent state ground cannot be so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent review of a decision upon a federal question. *McCoy* v. *Shaw*, 277 U.S. 302, 48 S.Ct. 519, 72 L.Ed. 891 (1928). Similarly an alleged state ground in inadequate when it is "so interwoven with the other federal ground as not to be independent," *Enterprise Irrigation District* v. *Canal Co.*, 243 U.S. 157, 164, 61 L.Ed. 644, 37 S.Ct. 318 (1917); *Oregon* v. *Kennedy*, 456 U.S. 667, 671, 72 L.Ed.2d 416, 102 S.Ct. 2083 (1982). *See also International Longshoremen's Ass'n* v. *David*, 476 U.S. 380, 388, 90 L.Ed.2d 389, 106 S.Ct. 1904 (1986) (review appropriate when state law ground is "not independent of federal law").

For the reasons stated below, the Petitioner argues that certiorari, pursuant to 28 U.S.C. 1257(a), is warranted and should issue.

## A. The Decision Below Conflicts With Applicable Decisions Of This Court And Improperly Decided An Important Federal Question. R.I.G.L. § 46-21-52 Does Not Violate Due Process Mandates.

### 1. *R.I.G.L. § 46-21-52 Applies* in pari materia *with R.I.G.L. § 44-9-27 Assuring Timely Notice to Mortgagees*

In Rhode Island, the statutory method for collecting sewer charges is established primarily by R.I.G.L. 46-21-23 (**Appendix F-8**). That statute requires the sewer commission to "collect all such charges in the same manner in which taxes are collected by municipalities. . . ."

The same statute specifically and appropriately incorporates by reference the statutory processes "provided for in Chapter 9 of Title 44." Accordingly, although Title 46 of the

Rhode Island General Laws is silent as to foreclosure of the equity of redemption, Rhode Island courts have traditionally incorporated redemption foreclosure proceedings applicable to tax sales into the sewer charge collection processes. *See Ashness* v. *Burr's Lane Associates*, 640 A.2d 522 (R.I. 1994) *(per curiam)*. *See also Weaver* v. *Arnold*, 15 R.I. 53, 23 A.41 (R.I. 1885). Pursuant to the requirements of R.I.G.L. 44-9-27, notice by certified mail was therefore specifically provided to the bank prior to foreclosure of the bank's property interests.

2. *The "Sewer Charge Sale" Stage of the Proceedings Was Not an Event Requiring Notice to the Mortgagee.*

In striking down R.I.G.L. § 46-21-52 as constitutionally defective, the Rhode Island Supreme Court relied heavily and improperly upon the decision of this Court in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). That case discussed the constitutional requirements of notice in proceedings directly and significantly affecting the property rights of parties. This Court, in keeping with its decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), held in *Mennonite* that an Indiana statute was unconstitutional because it did not give mailed notice of a pending tax sale to mortgagees at a critical stage of the process when the mortgagee "immediately and drastically" suffered an actual devaluation of its security interest. *See Mennonite*, 462 U.S. at 798.

*Mennonite* is clearly distinguishable from the case at bar and was accordingly misapplied by the Rhode Island Supreme Court. In contrast to Rhode Island, the Indiana code examined in *Mennonite* did not require additional judicial foreclosure subsequent to the "tax sale." Indiana procedure also did not afford the mortgagee and other interested parties mailed notice of the pending tax sale or their right of re-

demption. *Id.* at 793-794. Without notice of either of these events, the court recognized that there may be

> complete nullification of the mortgagee's interests, since the purchaser acquires title free of all liens and other encumbrances at the conclusion of the redemption period. *Id.* at 798.

By the *Mennonite* analysis, Rule 46-21-52 is constitutional when applied in conjunction with R.I.G.L. 46-21-22, R.I.G.L. 44-9-27, and R.I.G.L. 44-9-12 (the "operative statute" in sewer charge sales, *Ashness* v. *Burr's Lane, supra,* at p. 523). This conclusion is evident because those statutes require specific notice to the mortgagee before a mortgage can be extinguished by foreclosure of the mortgagee's right of redemption.

3. *Actual and Proper Notice was Provided to the Respondent.*

Actual notice was provided pursuant to R.I.G.L. § 44-9-27 to the respondent before the final nullification of its interests. The failure of R.I.G.L. § 46-21-52 to require notice to a mortgagee at the earlier sewer charge sale stage is accordingly not unconstitutional. This conclusion is fully in keeping with the analysis of this Court in both *Mullane* and *Mennonite.*

Rule 10.1(c) of the Rules of the Supreme Court of the United States acknowledges the propriety of review by way of certiorari

> When a state court . . . has decided an important question of federal law which has not been, but should be

> settled by this Court or . . . conflicts with applicable decisions of this Court.

Certiorari should issue accordingly.

### B. The Decision Below Erroneously Decided An Important Federal Question In A Way That Conflicts With Correct Decisions Of Another State Court Of Last Resort.

#### 1. *The Illinois Tax-Sale Mechanism is Most Analogous and Has Been Upheld by Both the Illinois Courts and This Court*

Illinois has analyzed and upheld similar tax sale statutes which also do not require notice to a mortgagee at the tax sale stage. *Rosewell* v. *Chicago Title and Trust Company*, 459 N.E.2d 966 (Ill. 1984), appeal dismissed *sub. nom. Blum* v. *Rosewell*, 467 U.S. 1237, 104 S.Ct. 3503, 81 L.Ed. 813 (1984). In so holding, the *Rosewell* court carefully distinguished the Illinois statutory provisions from the Indiana statutes construed by the *Mennonite* court.

As in Rhode Island, Illinois statutes provide that upon declaration of arrearages in real estate taxes, a tax sale is conducted and a tax title may be purchased by tendering an amount of money equal to the amount of the tax deficiency plus interest and penalties. The owner of the property sold at tax sale (or other interested party) may then redeem the property within two years after the tax sale by paying the delinquent tax plus a penalty, interest and costs. In the event of a failure to redeem, the tax title purchaser must file a petition in court. As in Rhode Island, the Illinois tax title purchaser must then serve notice of the petition upon all parties who have any interest in the real estate, including mortgagees, at that stage. After such notice, if no objection is filed by any of the interested parties, the tax title purchaser may obtain

judicial foreclosure after demonstrating compliance with the notice requirements under the statute. *Id.* at 967.

The *Rosewell* case was decided subsequent to *Mennonite* and has survived the scrutiny of this Court.

### 2. Mennonite *Does Not Invalidate the Rhode Island/ Illinois Tax Sale Model*

The Rhode Island Supreme Court below erred in disregarding the more analogous Illinois model which has been implicitly approved by this Court. *Rosewell* easily distinguished Illinois/Rhode Island tax sale procedures from the Indiana statute construed by *Mennonite*. In Indiana there is no substantive judicial proceeding *after* the tax sale has been accomplished. To the contrary, upon the expiration of the Indiana redemption period, the **full title** inured to the benefit of the purchaser of a tax title with no requirement of notice to interested parties. *Rosewell* at 970.

Under the Indiana statute, in contrast to both the Rhode Island and Illinois statutes, the purchaser of a tax title may be forced to purchase the real estate for a sum far greater than the amount of the delinquent taxes plus interest. In Rhode Island and in Illinois, the purchaser of a tax title need not pay more than the amount of actual tax arrearages plus interest. Hence, the mortgagee is not forced to pay more than the bona fide tax arrearages, plus a penalty and costs, in order to redeem the property.

The *Rosewell* court therefore reasoned that the mortgagee was in no worse position than he was prior to the tax title sale, and thus suffered no property deprivation due to the tax sale. As the mortgagee loses no cognizable property right, the court upheld the Illinois statute which did not require notice to the mortgagee of a pending tax sale at that stage. Most significantly, the Illinois tax sale statute has been upheld by this Court on two other, separate occasions. *See Balthazar* v. *Mari, Ltd.*, 301 F.Supp. 103, *Aff'd* (1969), 396 U.S. 114, 90

S.Ct. 397, 24 L.Ed.2d 307; *Catoor* v. *Blair*, 358 F.Supp. 815, *Aff'd* (1973), 414 U.S. 990, 94 S.Ct. 345, 38 L.Ed.2d 231.

As in Illinois, the Rhode Island procedure requires that mailed notice be given to any and all mortgagees of a tax title property before the equity of redemption may be foreclosed. R.I.G.L. § 44-9-27 (**Appendix F-2**). This statute is clearly implicated in sewer charge foreclosures and was precisely followed by the Petitioner in the Superior Court action below. Hence, in both Rhode Island and Illinois there is no "great deprivation of property interest" as presented by the Indiana statute analyzed in *Mennonite*.

Rule 10.1(b) of the Rules of the Supreme Court of the United States is directory and indicates that review by way of certiorari is appropriate when, as here, a state court erroneously decides an important question of federal law which conflicts with the decision of another state court of last resort.

Certiorari should issue accordingly.

### C. The Respondent's Alleged Due Process Right To Mailed Notice At The Sewer Sale Stage Is Inapplicable, Absent An Actual Deprivation Of Property Flowing Directly From Such Lack Of Notice.

The respondent's "due process" argument, although adopted by the Rhode Island courts below, was inherently erroneous because the bank was not directly deprived of any property interest by application of the challenged statute, R.I.G.L. § 46-21-52. Any deprivation which the mortgagee bank suffered directly resulted from its own neglect in failing to redeem after receiving notice of the sewer charge judicial foreclosure petition in November of 1991.

In *Hashway* v. *Shawmut Bank of Rhode Island*, 615 A.2d 1021 (R.I. 1992) the Rhode Island Supreme Court held that a mere tax sale does not eradicate a mortgage. Therefore, First Bank and Trust suffered no deprivation of property at the

sewer charge sale stage of the process. *See Rosewell* v. *Chicago Title and Trust Company, supra.* The Respondent's due process argument was misplaced because First Bank suffered no "deprivation" of property interest flowing directly from the sewer tax sale of October 12, 1990.

A tax sale in Illinois, like a sewer charge sale in Rhode Island, does not divest the mortgagee of any significant, cognizable property right. *Rosewell* v. *Chicago Title and Trust Company,* 459 N.E.2d 966 (Ill. 1984), appeal dismissed *sub. nom. Blum* v. *Rosewell,* 467 U.S. 1237, 104 S.Ct. 3505, 81 L.Ed. 813 (1984). In Rhode Island, the "title" acquired by a purchaser at a tax or sewer sale is severely limited and may not be conveyed until the equity of redemption has been extinguished by the court. *See Driscoll* v. *Karroo Land Company, Inc.,* 600 A.2d 722 (R.I. 1991); *Hashway* v. *Shawmut Bank of R.I.,* 615 A.2d 1021 (R.I. 1992) and *Ashness* v. *Burr's Lane, supra.* When judicial foreclosure of the equity of redemption took place, on January 9, 1992, the properly notified bank had every right to redeem the property for the amount of delinquent taxes, penalty and interest. By failing to do so, the bank created its own dilemma.

In the instant matter, the only proceeding having the potential to nullify the interest of the mortgagee was the hearing regarding the foreclosure of the equity of redemption. Prior to that, the Bank had lost nothing relative to its mortgage and could only be divested by the foreclosure of the equity of redemption. The failure of notice regarding the sewer charge sale had no impact upon the bank's property interest as nothing could be divested until judicial foreclosure of the equity of redemption.

The Bank only complained of the alleged unconstitutionality of the sewer charge sale because it later failed to answer the duly noticed petition to foreclose the equity of redemption. The bank also admitted that it received actual mailed

notice of the petition to foreclose the equity of redemption, but failed to respond and was defaulted.

Since the bank's own inaction, and not the "sewer charge sale," resulted in the nullification of the respondent's interest, the decision of the courts below were premised upon an infirm federal constitutional analysis.

Certiorari should issue accordingly.

### D The Rhode Island Supreme Court Interpretation Of The *Mennonite* Decision Works Both An Absurd And Onerous Result.

The Rhode Island Supreme Court, based squarely on an erroneous interpretation and application of *Mennonite*, assumed that federal constitutional mandates required incorporation of additional tax sale notices at the interim sewer charge sale stage. *See Ashness* v. *Tomasetti, supra* (**Appendix E**, at pp. 20-21).

Such an interpretation works a divestiture of the Petitioner's property in favor of a mortgagee whose rights, after notice and hearing, were "forever barred". *See* R.I.G.L. §§ 44-9-27 (**Appendix F-2**), 44-9-12 (**Appendix F-4**) and 44-9-30 (**Appendix F-3**).

R.I.G.L. § 44-9-31 (**Appendix F-5**) specifically mandates that:

> If a person claiming an interest desires to raise **any question** concerning the validity of a tax title, the person should do so by an answer filed in the proceeding . . . or else be forever barred from contesting or raising the question in any other proceeding.

The respondent bank's serial attempts to vacate the foreclosure of its rights of redemption and its ultimate success at the State Superior and Supreme Court levels accordingly worked a divestiture of the Petitioner's title in direct derogation of the specific Rhode Island statutory mechanisms.

By doing so, the Rhode Island Supreme Court ignored its own observation that

> It is a well settled principle of constitutional analysis that legislative enactments are presumed to be constitutional. *Brennan* v. *Kirby*, 529 A.2d 633, 639 (R.I. 1987).

First Bank did not and could not overcome this presumption below because R.I.G.L. § 46-21-52 was not unconstitutional as applied.

The application of the Court's opinion below unjustifiably divests the Petitioner of his property without due process or just compensation, in spite of the legislative protections afforded by R.I.G.L. §§ 44-5-31 and 44-9-30. Such a result leads to an absurd and onerous result which violates the petitioner's constitutional guarantees protected by both the 5th and 14th Amendments to the Constitution of the United States.

Certiorari should issue accordingly.

## CONCLUSION

A state court judgment will be vacated and the case remanded by the Supreme Court of the United States, where the opinion of the State Court indicates that it incorrectly felt bound to apply or follow federal law. *San Diego Bldg. Trades Council* v. *Garmon*, 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed.2d 618 (1957), *pet. den.* 353 U.S. 951, 77 S.Ct. 858, 1 L.Ed.2d 860 (1957), *motion den.* 354 U.S. 919, 77 S.Ct. 1374, 1 L.Ed.2d 1434 (1957), *and on remand* 49 Cal. 2d 595, 320 P.2d 473 (1957), *rev'd on other grounds* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 1434 (1959).

Where, as here, a state court restricts the operation of a state statute, not by reason of its own terms but because of supposed conflict with the Constitution of the United States, a constitutional question is involved; not merely one of statutory construction. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.Ed. 582 (1924).

Accordingly, on review of a state court judgment pursuant to 28 U.S.C. 1257(a), this Court will reach federal questions where a state court rests its decision primarily on federal law and where there is no plain statement that the decision below rested on adequate and independent state grounds. *Harris* v. *Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

In this case, both the Supreme and Superior Courts of the State of Rhode Island improperly declared a state statute unconstitutional based directly upon a faulty interpretation of federal due process mandates.

For these and all of the reasons stated herein, the Petitioner requests issuance of a writ of certiorari bringing the federal issues created by the erroneous opinion of the Rhode Island Supreme Court in *Ashness* v. *Tomasetti* directly before this Court.

Respectfully submitted,

JAMES P. MARUSAK
*Attorney for Petitioner*
GIDLEY, SARLI & MARUSAK
170 Westminster Street
Suite 500
Providence, RI 02903
(401) 274-6644

August 30, 1994

# APPENDIX A

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, S.C. SUPERIOR COURT

---

PM No. 91-7830

ROBERT E. ASHNESS

*v.*

JOYCE TOMASETTI, SUBURBAN LAND COMPANY, M & L MANAGEMENT INC., A RHODE ISLAND CORPORATION, SOPHIE KOSTY, FIRST BANK AND TRUST CO., AND MARTIN P. SLEPKOW AND MILTON S. SLEPKOW, TRUSTEES OF THE SLEPKOW, SLEPKOW AND BETTENCOURT, INC. PENSION PLAN

---

## PETITION TO FORECLOSE TAX LIEN

TO THE HONORABLE JUDGE OF THE SUPERIOR COURT:

The undersigned hereby represents that the land hereinafter described was sold on October 12, 1990 for non-payment of taxes or fees by Blackstone Valley Dist. Comm. in the County of Providence by instrument dated November 29, 1990 and duly recorded on December 3, 1990 in Book 250, Page 261 that more than one year from the date of said sale has elapsed and no redemption has been made; that the proceedings aforesaid have been conducted according to law; that deed was recorded within 60 days from date of sale — that the undersigned now holds title under said instrument; that the following are the names and addresses of all persons known to the undersigned who have any interest in said land, other than the petitioner:

to wit*

| Name | Address | Interest |
|---|---|---|

See Attached Exhibit A

that the assessed value of said land and buildings is $ ; and that said land is described as follows:

See Attached Exhibit B

WHEREFORE your petitioner prays that the rights of all persons entitled to redeem from said proceedings may be foreclosed, that said Court enter a decree that the title of petitioner to said land under said proceedings is absolute, and that all rights of redemption are barred, and for such other and future relief as may seem meet and proper to said Court:

Name: ROBERT E. ASHNESS s/ ROBERT E. ASHNESS
Address: 44 Frances Drive, Cranston, RI 02920

On this 16th day of November 1991, personally appeared before me the within named Robert E. Ashness known to me to be the signer of the foregoing petition and made oath, that the statements therein contained so far as made of his own knowledge are true so far as made upon information and belief that he believe them to be true.

Before me:

| | |
|---|---|
| s/ PATRICK T. CONLEY | s/ PATRICK T. CONLEY |
| PATRICK T. CONLEY | PATRICK T. CONLEY |
| Attorney for the Petitioner | Notary Public |

## APPENDIX B

STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

P.M. No. 91-7830

ROBERT E. ASHNESS

*v.*

JOYCE TOMASETTI, ET ALS.,

### CERTIFICATE OF SERVICE BY REGISTERED OR CERTIFIED MAIL

I hereby certify that I have this day served the foregoing citation by causing to be mailed a duly attested copy thereof, to each respondent named therein whose address was furnished by the petitioner or otherwise known to me, such copies being sent by certified mail and return receipts required.

s/ PATRICK T. CONLEY

PATRICK T. CONLEY

| | |
|---|---|
| ● SENDER: Complete Items 1 and 2 when additional services are desired, and complete Items 3 and 4.<br>Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. *The return receipt fee will provide you the name of the person delivered to and the date of delivery.* For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.<br>1. ☐ Show to whom delivered, date, and addressee's address. *(Extra charge)* 2. ☐ Restricted Delivery *(Extra charge)* | |
| 3. Article Addressed to:<br>First Bank & Trust Co.<br>180 Washington Street<br>Providence, RI 02903 | 4. Article Number<br>P 725 694 590<br>Type of Service:<br>☐ Registered ☐ Insured<br>☒ Certified ☐ COD<br>☐ Express Mail ☒ Return Receipt for Merchandise |
| 5. Signature — Addressee<br>X | 8. Addressee's Address *(ONLY if requested and fee paid)* |
| 6. Signature — Agent<br>X ILLEGIBLE | |
| 7. DATE OF DELIVERY<br>11/22/91 | 91-7830 |

PS FORM 3811, APR. 1989 © U.S.G.P.O. 1990-236-418 DOMESTIC RETURN RECEIPT

## APPENDIX C

27 APRIL 1993

[3] THE COURT: The matter before the Court is 917830, Robert D. Ashness v. Joyce Tomasette, and PM915114, Robert Ashness v. John Howard.

THE COURT: Gentlemen, in both of your arguments, that is both defendants raise the question of constitutionality of the statute, am I correct?

MR. HAGUE: Yes, your Honor.

THE COURT: Did you bring the Attorney General in?.

MR. HAGUE: I noticed him, your Honor.

THE COURT: You did?

MR. HAGUE: Yes, I did.

THE COURT: Which case was that?

MR. HAGUE: Tomasette.

THE COURT: Tomasette?

MR. HAGUE: Yes, your Honor.

THE COURT: I don't see anything in the file on that. Do You have a copy of what your —

MR. HAGUE: I didn't bring my whole file, but I should have it in here, your Honor.

* * *

[6] THE COURT: . . . Tomasette, did you say you noticed the Attorney General?

MR. HAGUE: I got copies of notice. I got the original green card.

THE COURT: All right. And were copies filed in the original file?

MR. HAGUE: Yes, your Honor. Your Honor, I probably did not file the green card, but I would have had a certification on the notice to the Attorney General.

THE COURT: All right. I want to be sure the file contains an indication you've notified the Attorney General that you're raising the constitutionality of that particular statute involving the Blackstone Valley Sewer District Commission.

MR. CONLEY: Right. He declares that statute is unconstitutional.

THE COURT: All right. There was recently brought to my attention the Loudmiller case, an analogous case involving teacher contracts. Involving a firing in which the teacher was not notified before suspension or firing actually that the firing had taken place, it seems to me the United States Supreme Court has taken the position when there's a right or interest of some [7] kind, whether property right or right of freedom, or some other right, that you can't do without prior notification. It seems to me the statute involving the Blackstone Valley Sewer District Commission, which does not require notification to the mortgagee before you engage in the first sale, is unconstitutional. I think every person who has an interest should be notified every step of the way, and for that reason, I'll grant Mr. Hague's relief.

MR. HAGUE: Thank you, your Honor.

THE COURT: Make some more law, Mr. Conley.

MR. CONLEY: I guess so, your Honor, because this is definitely going back up.

## APPENDIX D

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, S.C.

C.A. NO. 91-7830

ROBERT E. ASHNESS
*v.*
JOYCE TOMASETTI, ET AL

### JUDGMENT

The above-entitled matter having come on for hearing before Mr. Justice Gagnon on the motion of FIRST BANK AND TRUST COMPANY to vacate the judgment entered on January 9, 1992 foreclosing the Bank's right of redemption concerning real estate located at 640-642 Pine Street, Central Falls, Rhode Island (hereinafter the "premises"). After the submission of memoranda and argument of counsel and for the reasons set forth in Mr. Justice Gagnon's bench decision of April 27, 1992 which is incorporated herein by reference, the Court holds, as a matter of law, that R.I.G.L. 46-21-52 which allows the Blackstone Valley District Commission to hold a tax sale for nonpayment of sewer fees without actual notice to the holder of a mortgage on the premises being sold, is unconstitutional. Based on the foregoing, judgment is hereby entered as follows:

ORDERED:

1. R.I.G.L. 46-21-52 which authorizes the Blackstone Valley District Commission to hold a tax sale for nonpayment of sewer fees without actual notice to the holder of a mortgage on the premises being sold is unconstitutional.

2. The tax sale held on October 12, 1990 by the Blackstone Valley District Commission which sale was held without

actual notice to First Bank and Trust Company, holder of a mortgage on the premises, is determined to be null and void ab initio as is the deed from the Blackstone Valley District Commission to Robert E. Ashness recorded on December 3, 1990 in Book 250 at page 260 of the Central Falls Land Evidence Records.

3. The judgment entered by this Court on January 9, 1992 against First Bank and Trust Company and others foreclosing all right of redemption is hereby vacated. This judgment was recorded on January 13, 1992 in Book 261 at page 265 of the Central Falls Land Evidence Records.

4. Title to said premises is hereby vested in Joyce Tomasetti who was the owner of record of the premises immediately prior to the tax sale on October 12, 1990 subject to all mortgages and other encumbrances of record.

ENTERED as an Order of this Court this 4th day of May 1993.

ENTER:
s/ ILLEGIBLE
5-4-93

BY ORDER,
s/ ILLEGIBLE

## CERTIFICATION

I hereby certify that on April 29, 1993, I faxed a copy of the within Judgment to Patrick T. Conley, Esq. and to Edward R. DiPippo, Esq.

PRESENTED BY:
s/ ILLEGIBLE
WILLIAM F. HAGUE, JR.
DICK & HAGUE, LTD.
2020 Hospital Trust Tower
Providence, RI 02903-2428

## APPENDIX E

SUPREME COURT

No. 93-290-Appeal.
(PM 91-7830)

ROBERT E. ASHNESS
*v.*
JOYCE TOMASETTI ET AL.

NOTICE: This opinion is subject to formal revision before publication in the Rhode Island Reporter. Readers are requested to notify the Opinion Analyst, Supreme Court of Rhode Island, 250 Benefit Street, Providence, Rhode Island 02903, at Tel. 277-6588 of any typographical or other formal errors in order that corrections may be made before the opinion is published.

SUPREME COURT

No. 93-290-Appeal.
(PM 91-7830)

ROBERT E. ASHNESS
*v.*
JOYCE TOMASETTI ET AL.

## OPINION

MURRAY, J. This matter came before the Supreme Court on the appeal of the plaintiff, Robert E. Ashness (Ashness), from a Superior Court judgment granting the second motion for relief from judgment of First Bank and Trust Company (First Bank). In the judgment that Ashness challenges, the Superior Court justice (1) declared G.L. 1956 (1991 Reenactment) § 46-21-52 unconstitutional, (2) declared null and void *ab initio* a tax sale of certain real estate in the city of Central Falls held on October 12, 1990, by the Blackstone Valley District Commission (Blackstone commission), (3) vacated a January 9, 1992 judgment against First Bank and others that had foreclosed all rights of redemption with regard to that sale of the subject property, and (4) declared the title to the property vested in the defendant Joyce Tomasetti (Tomasetti) subject to all mortgages and other encumbrances of record.

We have gleaned the following facts from the very brief transcript and other portions of the record in this case. In November 1991 Ashness filed in the Superior Court a petition to foreclose a tax lien. In the petition he alleged that on October 12, 1990, the Blackstone commission had sold the subject real property for the nonpayment of taxes or fees. The commission had conveyed the property by an instrument dated November 29, 1990, and recorded on December 3, 1990, in book 250, page 261. Ashness also asserted that more than a year from the date of the sale had elapsed and no redemption had been made. The petition declared that the

deed had been recorded within sixty days from the sale date and that Ashness then held title under the instrument. Ashness provided a list of people or entities known to him as possessing any interest in the land and described the nature of the interest as follows: Tomasetti, former fee holder; Suburban Land Co. (Suburban), tax lien holder; and several mortgagees, including First Bank. All these parties were named as defendants.

A court-appointed title examiner submitted a report, which a Superior Court justice approved and accepted, containing the same list of people or entities and their possible interest in the subject property. Ashness's attorney also filed a petition for the appointment of a guardian ad litem and a motion for appointment of an attorney under the Soldiers' and Sailors' Relief Act. The Superior Court justice appointed attorneys in response to these requests.

Suburban then filed an answer to Ashness's petition, which response included an offer to redeem the real estate described in the petition pursuant to G.L. 1956 (1988 Reenactment) § 44-9-29. In its answer Suburban stated that it was the holder of a tax title in the subject premises and requested that the court establish a time and terms for redemption.

On January 9, 1992, Suburban withdrew its answer and offer to redeem, and it joined with Ashness in his requests for relief. Also on that date, default was entered against defendants in response to Ashness's application for such entry. In support of his application, Ashness's counsel submitted an affidavit, in which he attested, among other things, that defendants, except for the attorney for persons in the military service and the guardian ad litem, had failed to plead or defend and that defendants had been duly served with the petition to foreclose. He also filed a certificate of service by registered or certified mail to which were affixed return receipts indicating that Tomasetti, Suburban, First Bank, and the other defendants had been served in November 1991. Additionally on that date the Superior Court justice issued a

final decree, ordering that all rights of redemption be forever foreclosed and barred.[1]

Approximately four months later First Bank filed a motion for relief from judgment pursuant to G.L. 1956 (1985 Reenactment) § 9-21-2(a)(1). That section authorizes a court to relieve a party from a final judgment or decree, among other things, for excusable neglect, mistake, inadvertence, or surprise.[2] Among First Bank's assertions were the following: that in 1988 its borrowers had executed and delivered to First Bank a promissory note for $165,000 secured by a mortgage on the subject real estate; that without First Bank's knowledge or consent, the borrowers transferred title to the real estate to a realty corporation, which deed was recorded in 1989, and the realty corporation subsequently transferred title to Tomasetti, by deed recorded May 18, 1990; that on October 12, 1990, the Blackstone commission held a tax sale of the property, which Ashness purchased, and a deed was recorded in December 1990; and that Ashness filed a petition to foreclose the right of redemption relative to that sale and "[n]otice of Mr. Ashness' petition was acknowledged by the Bank by the signing of a certified receipt by Robert Barricelli, the

[1] This decree stated that "all rights of redemption [were] forever foreclosed and barred under the deed given by the Collector of Taxes for the City of Central Falls in the County of Providence and State of Rhode Island dated and duly recorded in the records of land evidence of said City [of] Central Falls Book 250 at Page 261." As stated above, however, Ashness's petition described the land as having been sold by the Blackstone commission by an instrument dated November 29, 1990, and duly recorded on December 3, 1990, in book 250, page 261. Although the record does not contain a copy of the instrument, we conclude that both Ashness's petition and the court's decree refer to the same instrument, which referenced the Blackstone commission sale.

[2] Rule 81(a)(2) of the Superior Court Rules of Civil Procedure provides that those rules do not apply to proceedings involving petitions for foreclosure of redemption of interests in land sold for nonpayment of taxes, except for the method prescribed for taking an appeal to the Supreme Court. *See Gaudreau* v. *Blasbalg*, 618 A.2d 1272, 1274 (R.I. 1993).

Bank's messenger, on November 22, 1990."[3] First Bank also stated in its motion that on January 23, 1992, Ashness recorded a deed granting a one-half interest in the property to Suburban. First Bank asserted that when it receives a tax-sale notice as a mortgagee, it contacts its customer, and if the customer does not pay the required taxes, First Bank will do so. It claimed not only that § 46-21-52, which authorizes the Blackstone commission to sell the real estate of delinquent taxpayers, does not mandate that the Blackstone commission notify mortgagees but also that the commission did not in fact notify First Bank of the sale.

First Bank further argued that its failure to respond to Ashness's petition was the result of mistake, excusable neglect, or inadvertence. By way of explanation First Bank delineated the following "policy" regarding its receipt of a petition to foreclose the right of redemption: after receiving the mail, First Bank's messenger is to give it to First Bank's mail clerk, who then sorts the mail and directs the correspondence to either of two loan officers. Although First Bank conceded that its messenger signed for service of the petition, First Bank assumed that the petition was either lost or misplaced because no First Bank officer received a copy of the petition or had actual knowledge that it had been received. It submitted affidavits of the two loan officers, in which each stated that he or she had not received a copy of the petition to foreclose and had no knowledge of its filing until April 1992. First Bank also filed an affidavit in which its mail clerk denied recalling the receipt of a petition to foreclose the right of redemption in this matter. First Bank also claimed in its motion that it would be inequitable to permit Ashness to acquire a property

[3] First Bank's motion stated that Ashness filed his petition on October 20, 1991. However, the record reflects that Ashness filed his petition on November 20, 1991.

First Bank's motion also apparently misstates the year in which its messenger signed for the receipt. The date should read November 22, 1991, to conform to the evidence in the record and to eliminate the illogical implication otherwise that the bank's messenger acknowledged receipt of the petition approximately a year before Ashness filed the petition.

with an appraised value of $145,000 for $1,186.85, which amount he had paid.

In Ashness's memorandum in opposition to First Bank's motion for relief from judgment, he asserted that notice to defendants was proper and strictly in accordance with the applicable statute. Ashness also contended that the default judgment must be allowed to stand and that a Superior Court decree in a tax-title foreclosure case is final and absolute and reversible only by the Supreme Court on appeal. Apparently, a Superior Court justice denied First Bank's motion.[4]

More than six months later, First Bank filed a motion for relief from judgment pursuant to § 9-21-2(a)(4), seeking an order vacating the January 9, 1992 judgment foreclosing its right of redemption on the ground that the judgment was void. First Bank's statement of facts contained an important item that was absent from its first motion for relief from judgment: it stated that on June 4, 1990, the Central Falls tax collector had held a tax sale of the subject property and conveyed it to Suburban. Although First Bank repeated the claim it had made in its first motion regarding its lack of notice of the Blackstone commission's sale of the property in October 1990, it did not make any reference to any notice that it might have received regarding the earlier tax sale in June 1990.

First Bank's main argument in this second motion for relief from judgment was that the Blackstone commission's sewer-charge tax sale was unconstitutional because § 46-21-52 allows a tax sale without notice to a mortgagee.[5] First Bank asserted

---

[4] The case file does not contain a document indicating the outcome of any hearing on the motion. The docket sheet, however, seems to establish that a motion justice denied the motion.

[5] General Laws 1956 (1991 Reenactment) § 46-21-52 provides:

> "Notice of tax sale to resident taxpayer. — (a) If the person to whom the estate is taxed be a resident of this state, the commission shall notify the resident of the time and place of sale, either by registered or certified mail sent postpaid to the resident's last and usual place of abode not less than twenty (20) days before the date of sale or any adjournment thereof, or be left at the resident's last and usual place of abode, or personally served on the resident not less than twenty (20) days before the date of sale or any adjournment thereof ***.

that this violates the holding of the United States Supreme Court in *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983). In support of its argument, First Bank's counsel filed with the motion an affidavit in which he stated that he had examined the Blackstone commission's records and found that the only notices that the commission had sent concerning its tax sale on October 12, 1990, were to Tomasetti and Suburban.[6] The document was entitled "Official Notice of Proposed Advertisement and Sale of Real Estate for Non-Payment of Sewer Charges."

Ashness's memorandum in response to this motion for relief from judgment stated that First Bank had accurately set forth the facts of the case except for its failure to note that Central Falls had held a tax sale on June 4, 1990, four months prior to the Blackstone commission sale, and had given "certified mail notice of that sale to Defendant-Bank, which took no action thereon."[7] With respect to First Bank's constitutional arguments, Ashness asserted that the Rhode Island statute

---

(b) Persons aged sixty-five (65) years and over or persons suffering from a disability may designate a third party, to whom notice may be sent as required pursuant to this section, by advising the commission of the name and address of the person.

(c) If the estate taxed is a corporation, the notice may be sent either by registered or certified mail to its place of business or left at the business office of the corporation with some person there employed."

[6] First Bank's motion also contained a footnote referring to Ashness's transfer of a one-half interest in the property to Suburban after the decree foreclosing the right of redemption had been issued. The bank accused Ashness and Suburban of engaging in "machinations" that apparently were "intended to take advantage of the Bank's default." It asserted that if Suburban had proceeded with its redemption, it would have had to foreclose the bank's right of redemption from the municipal tax sale by a separate petition; by receiving the one-half interest from Ashness, Suburban avoided the need to file its own foreclosure petition.

[7] The record contains no document evidencing the June 4, 1990 Central Falls sale or any notice sent to the First Bank or any other party regarding that sale. Additionally the only transcript in our possession is the Superior Court justice's hearing on First Bank's second motion for relief from judgment. That transcript contains no reference to the Central Falls tax sale or any notice that First Bank may have received regarding such sale.

is distinguishable from the state statutes that the United States Supreme Court invalidated in *Mennonite* and in an earlier case, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). He maintained that § 46-21-52 must be construed in conjunction with the procedures set forth in chapter 9 of title 44, specifically § 44-9-27, which he argued does provide for certified-mail notice to mortgagees.[8]

Ashness also argued that in the instant case the bank had been put on notice by the city of Central Falls regarding tax problems relative to the subject property and had received and ignored certified-mail notice of his petition to foreclose the right of redemption. Ashness further maintained that First Bank suffered no deprivation to trigger Fourteenth Amendment protections because at the time of the Blackstone commission sale "the subject premises were already tax-reverted by virtue of a June sale by the City of Central Falls to Suburban Land Company, so that Bank's status as mortgagee was unaltered by the second sale." Ashness also alleged that First Bank had never redeemed from that first sale.

First Bank filed a response to Ashness's memorandum, in which it quoted certain sections of *Mennonite* to support its argument and accused Ashness of attempting to "bootstrap" the unconstitutionality of § 46-21-52 by incorporating the notice requirement of § 44-9-27, concerning the foreclosure of the right of redemption. First Bank also stated that it did not ignore notice of Ashness's petition, and it objected to Ashness's "reference to the tax sale by the City Collector because no petition was ever filed concerning that sale; and if the

---

[8] General Laws 1956 (1988 Reenactment) subsection (a) of § 44-9-27 provides in relevant part that a petitioner to foreclose the right of redemption relative to a tax sale "shall, upon the filing of the [title] examiner's report, notify all persons appearing to be interested [in the title], whether as equity owners, mortgagees, lienors, attaching creditors, or otherwise, of the pendency of the petition, the notice to be sent to each by registered or certified mail and return of receipt required. Such other and further notice by publication or otherwise shall be given as the court may at any time order."

Bank is successful in this matter, it will also redeem the property from that sale."

At the hearing on April 27, 1993, the Superior Court justice stated that he had recently become aware of "the Loudmiller case, an analogous case involving teacher contracts."[9] He further stated:

> "[I]t seems to me the United States Supreme Court has taken the position when there's a right or interest of some kind, whether property right or right of freedom, or some other right, that you can't do without prior notification. It seems to me the statute involving the Blackstone Valley Sewer District Commission, which does not require notification to the mortgagee before you engage in the first sale, is unconstitutional. I think every person who has an interest should be notified every step of the way, and for that reason, I'll grant [counsel for First Bank's] relief."

As noted above, the Superior Court justice declared § 46-21-52 unconstitutional, declared null and void *an initio* the Blackstone commission's tax sale of October 12, 1990, vacated a judgment against First Bank and others that had foreclosed all right of redemption with regard to that sale of the subject property, and declared the title to the property vested in Tomasetti subject to all mortgages and other encumbrances of record.

In his appeal Ashness argues that § 46-21-52 is constitutional when read *in pari materia* with certain other statutory provisions; that default judgment should not have been vacated because Ashness, Michael J. Voloso,[10] and Suburban

---

[9] We believe that the Superior Court justice was actually citing *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), which involved employees of two boards of education, one a security guard and the other a bus mechanic.

[10] According to Ashness's brief submitted to this court, in August 1992 Michael J. Voloso accepted a transfer of an interest in the subject property "in good faith reliance upon foreclosure of the right of redemption." Voloso has not been joined as a party to this action, but neither his alleged interest

considered First Bank's interests "forever barred" and the bank should be equitably estopped from vacating the default judgment; that First Bank's motion for relief from judgment is barred pursuant to Rule 81(a)(2) of the Superior Court Rules of Civil Procedure; that the bank's motion was otherwise improper and untimely and was barred by res judicata, law of the case, and collateral estoppel; and that regardless of constitutionality the default judgment should not have been vacated because public policy, justice, and judicial efficiency would require a ruling that § 46-21-52 was unconstitutional to be applied only prospectively.

First Bank asserts that the motion justice correctly held § 46-21-52 unconstitutional because it provides for a tax sale without notice to a mortgagee, that it is immaterial whether this court's decision is applied prospectively or retrospectively because in either case the outcome would affect Ashness, and that the other issues Ashness raises were not preserved for review and that even if they had been, "they have no validity."

Ashness first argues that § 46-21-52 is constitutional when read *in pari materia* with other provisions of the General Laws. Specifically Ashness asserts, among other things, that the method for collecting sewer charges as set forth in § 46-21-22 includes the requirement that the Blackstone commission collect such charges in the same manner in which municipalities collect taxes. He argues that the Indiana tax-sale statute that the Supreme Court invalidated in *Mennonite* was distinguishable from the Rhode Island statute, partly because the former statute did not require judicial foreclosure and did not provide the mortgagee and other interested parties with mailed notice of the pending tax sale or their right of redemption. He contends that in *Rosewell* v. *Chicago Title and Trust Co.*, 99 Ill.2d 407, 459 N.E.2d 966, *appeal dismissed sub nom. Blum* v. *Rosewell*, 467 U.S. 1237, 104

in the property nor his nonjoinder as a party had any bearing on our decision in this matter.

S.Ct. 3503, 82 L.Ed.2d 813 (1984), the Supreme Court of Illinois upheld that state's tax-sale statute despite its lack of a requirement for actual or mailed notice of a tax sale to a mortgagee by distinguishing the provisions of that statute from the Indiana statute struck down in *Mennonite*. He argues that our statute shares several similarities with that of Illinois.

Ashness further maintains that any deprivation of property that First Bank suffered first took place "as the result of the duly noticed municipal tax sale which occurred *prior* to the sewer tax sale and secondly as a result of its own neglect in failing to redeem after receiving notice of the sewer charge judicial foreclosure" in 1991. He claims that given this court's recent holding in *Hashway* v. *Shawmut Bank of Rhode Island*, 615 A.2d 1021 (R.I. 1992) (mem.), that a tax sale does not extinguish a mortgage, First Bank was not deprived of property at either the municipal tax sale or the sewer tax sale. He maintains that First Bank "admittedly *was given* notice" of the first tax sale but failed to attend.

First Bank counters that § 46-21-52 makes no provision for notice to be sent to mortgagees regarding sewer-charge tax sales. It argues that although § 46-21-52 is very similar to § 44-9-10, as amended by P.L. 1990, ch. 473, § 1 of the municipal-tax-sale statute, the Blackstone commission statute lacks a provision analogous to § 44-9-11, which mandates notice of municipal tax sales to mortgagees. First Bank also contends that a mortgagee's property interest is substantial and in this case has been diminished. It asserts that if notice had been given to it prior to the sewer-charge tax sale, it would have had an opportunity to safeguard its interests. It claims that Rhode Island's situation is not sufficiently similar to that of Illinoi for *Rosewell* to be persuasive. If this court finds merit in Ashness's argument regarding reading § 46-21-52 *in pari materia* and finds that notice is required in the statute as interpreted — in that manner, then the statute was violated because First Bank did not receive notice and the sale is void, it contends.

Before we address these arguments, we must note a preliminary issue, although neither of the parties raised this matter and the Superior Court justice made no comment in this regard. Section 46-21-52 has been repealed, along with the rest of the Blackstone commission statute. General Laws 1956 (1991 Reenactment) chapter 25.1 of title 46 provided for the merger of the Blackstone commission with the Narragansett Bay Water Quality Management District Commission (Narragansett commission). Section 46-25.1-1(c) provided that the merger would be effective no later than December 31, 1991, but that the Narragansett commission had the discretion to extend the effective date of the merger up to and including June 30, 1992. Section 46-25.1-1(f) stated that upon the merger's completion as certified to the Secretary of State, chapter 21 of title 46 entitled "Blackstone Valley sewer district" would be completely repealed. *See Town of Lincoln* v. *City of Pawtucket*, 606 A.2d 989 (R.I. 1992).

The Blackstone commission's sale of the subject premises took place in 1990, prior to the repeal of the challenged statute. We conclude that the dispute in this matter regarding the constitututionality of § 46-21-52 is not moot and therefore remains justiciable because the litigants still possess an ongoing stake in the controversy. *See Seibert* v. *Clark*, 619 A.2d 1108, 1110 (R.I. 1993).

The motion justice granted relief from judgment because he concluded that the judgment was void since the statute authorizing the second sale was unconstitutional. We now review his decision to determine whether he erred as a matter of law.

The Blackstone commission was a state agency created to plan, construct, operate, and maintain facilities for abating pollution from sewage and industrial waste originating in several municipalities and industries in the Blackstone and Moshassuck Valleys. *See* § 46-21-2; *see also City of Central Falls* v. *Halloran*, 94 R.I. 189, 191-92, 179 A.2d 570, 571 (1962). Section 46-21-21 authorized the commission to assess any person who had a direct or an indirect connection to

the sewer district project reasonable charges for the use, operation, maintenance of, and improvements to the project. If a municipality failed to assess sewer charges pursuant to G.L. 1956 (1991 Reenactment) chapter 14 of title 45 by a certain date, the Blackstone commission was required to make a direct assessment of reasonable charges against certain persons, firms, or corporations with an indirect connection with the project. *See* § 46-21-22. That section also provided in relevant part that

> "[t]he commission shall proceed under the provisions of this chapter to collect the assessments ***. Each person, firm, or corporation so assessed shall pay the charges assessed against it or them by the commission *** and *the commission may collect all such charges in the same manner in which taxes are collected by municipalities with no additional charges, assessments, or penalties other than those provided for in chapter 9 of title 44* [the municipal-tax-sale statute]. All unpaid charges shall be a lien upon the real estate of the person, firm, or corporation." (Emphasis added.)

Section 46-21-23 similarly provided for the assessment of charges against users with a direct connection with the sewer district project; it also empowered the commission to collect such charges in the same manner in which taxes were collected by municipalities and provided that unpaid charges would be a lien upon the real estate of the person, firm, or corporation.

We note that sewer charges are not generally regarded as taxes. *See Costello* v. *Ricci*, 121 R.I. 509, 512, 401 A.2d 38, 40 (1979). However, as noted in the above discussion, the Blackstone commission is authorized to collect sewer charges in the same manner in which municipalities collect taxes, and the statutory provision even refers specifically by chapter and title to the municipal-tax-sale statute. When a statute adopts the provisions of another statute by specific reference, the effect is as if the referenced statute had been incorporated into the adopting statute. *See Lawrence* v. *Anheuser-Busch, Inc.*, 523 A.2d 864, 872 (R.I. 1987) (citing *Hassett* v. *Welch*, 303

U.S. 303, 314, 58 S.Ct. 559, 564, 82 L.Ed. 858, 866-67 (1938)). Additionally, the heading of § 46-21-52, which provision the Superior Court justice held unconstitutional, makes reference to a "tax sale" and subsection (a) refers several times to a "sale." The notice that the Blackstone commission sent out refers to a sale, as mentioned above. Furthermore, we recently ruled in another case in which Ashness purchased property at a sale that the Narragansett commission conducted for the nonpayment of fees. *See Ashness* v. *Burr's Lane Associates*, 640 A.2d 522 (R.I. 1994) (per curiam). Without discussion of the Narragansett commission statute, chapter 25 of title 46, we stated that "[t]he operative statute controlling the rights conveyed to a purchaser at a tax sale is *** § 44-9-12," and we proceeded to apply that statute in order to analyze Ashness's rights as holder of the tax title. *See* 640 A.2d at 523; *see also Weaver* v. *Arnold*, 15 R.I. 53, 23 A.41 (1885) (involving a sale of real property for nonpayment of "sewer taxes"). We also note that current Narragansett commission regulations governing wastewater-facility operations in a district that includes the municipalities that formerly composed the Blackstone commission state that "[t]he [Narragansett] Commission has a lien upon the real estate of each and every User of the Facilities for all unpaid [sewer use] charges, which lien operates as liens resulting from failure to pay real estate taxes." *See* Rules and Regulations for the Use of Wastewater Facilities Within the Narragansett Bay Water Quality Management District, Bucklin Point Wastewater Treatment Facility § 11.13 (received 1991), 22 C.R.I.R. 96 070 005 001, 96 070 005 065 (1992).

We first examine the constitutionality of § 46-21-52 in isolation, and we then evaluate its constitutionality when read in conjunction with the municipal-tax-sale statute. The motion justice apparently relied upon *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), but we think *Mennonite* is more closely related to the facts of this case.

In *Mennonite* the Court framed the issue broadly, specifically "whether notice by publication and posting provides a mortgagee of real property with adequate notice of a proceeding to sell the mortgaged property for nonpayment of taxes." *See* 462 U.S. at 792, 103 S.Ct. at 2708, 77 L.Ed.2d at 183. In accordance with Indiana law, notice of an upcoming tax sale of certain real property was sent to the owner (who was the mortgagor), and an announcement concerning the sale was posted and published. *See id.* at 792-94, 103 S.Ct. at 2708-09, 77 L.Ed.2d at 183-85. The mortgagee later opposed the efforts of the tax-sale purchaser to quiet title to the property. *See id.* at 792-95, 103 S.Ct. at 2708-09, 77 L.Ed.2d at 183-85. The mortgagee argued that it had not received constitutionally adequate notice of the pending tax sale and of the opportunity to redeem the property subsequent to the sale. *See id.* at 795, 103 S.Ct. at 2709, 77 L.Ed.2d at 185.

The Court agreed, stating that its analysis was controlled by its decision in *Mullane*. *See id.* at 798-800, 103 S.Ct. at 2711-12, 77 L.Ed.2d at 187-88. In *Mullane*, the Court explained, it had acknowledged that before a state takes an action that "will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment," it "must provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *See* 462 U.S. at 795, 103 S.Ct. at 2709, 77 L.Ed.2d at 185. The *Mennonite* Court concluded that "a mortgagee possesses a substantial property interest that is significantly affected by a tax sale," and because of this "legally-protected property interest," a mortgagee "is entitled to notice reasonably calculated to apprise him [or her or it] of a pending tax sale." *See id.* at 798, 103 S.Ct. at 2711, 77 L.Ed.2d at 187. The Court reasoned that because notice by publication and posting are mainly designed to appeal to prospective tax-sale purchasers, they are not likely to reach those who do not keep abreast of such notices. *See id.* at

799, 103 S.Ct. at 2711, 77 L.Ed.2d at 187. The Court proceeded to mandate that constructive notice by publication be supplemented by personal service or by notice mailed to the mortgagee's last-known available address when a mortgagee is identified in a publicly recorded mortgage. *See id.* at 798, 103 S.Ct. at 2711, 77 L.Ed.2d at 187. The Court also made the following broad pronouncement:

> "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthermore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *See id.* at 800, 103 S.Ct. at 2712, 77 L.Ed.2d at 188.

*See generally* Michael H. Rubin & E. Keith Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite*, 48 La. L.Rev. 535 (1988). Although we acknowledge that the Indiana tax-sale statute contains certain provisions that substantially differ from our tax-sale statute, we conclude that the holding in *Mennonite* is broad enough so that it applies equally to our statute.

Analyzed by itself, then, § 46-21-52 requires notice of a Blackstone commission "tax sale" to be sent to a resident taxpayer by registered or certified mail, to be left at the resident's last residence, or to be served on the resident personally. It contains no requirement for notice to mortgagees. Consequently we conclude that it does not comport with the broad holding in *Mennonite* and, standing alone, it violates constitutional guarantees of due process. As we discussed above and as Ashness argues in part, however, we think that because the Blackstone commission statute refers to and thus incorporates at least certain sections of the municipal-tax-sale statute, we must analyze the provisions of that statute as well.

The municipal-tax-sale statute explicitly authorizes the tax collector to sell by public auction for the amount of unpaid taxes, among other things, the smallest undivided part of the land that will satisfy the tax debt. *See* §§44-9-7, 44-9-8. The statute requires notice by posting and advertisement of the sale. *See* §44-9-9. Section 44-9-10 is similar to § 46-21-52, and the current version mandates notice to a taxpayer, whether or not a state resident, by certified or registered mail, by leaving such notice at the taxpayer's last and usual place of abode, or by personal service. Section 44-9-11 requires that the tax collector notify mortgagees of record of an upcoming tax sale by one of those three notice methods; with respect to other interested parties, however, that section deems sufficient the notice provided for in § 44-9-9.

Because the Blackstone commission statute contains no provision for petitioning to foreclose the right of redemption, we conclude that Ashness must have proceeded under certain sections of the tax-sale statute, including § 44-9-25, which authorizes a tax-title holder to petition the Superior Court to foreclose all rights of redemption under that title. Section 44-9-27 requires that such a petitioner notify all persons who may be interested in the title, including mortgagees, by certified or registered mail, with a return receipt required, of the pendency of the petition. The record reflects that Ashness did accomplish this required mailing of notice.

We think that although the Blackstone commission statute required notice to resident taxpayers and was silent on notice to mortgagees, or other interested parties, § 44-9-11 was incorporated in the Blackstone scheme. We conclude that the Blackstone commission was therefore required to provide notice to First Bank in the manner prescribed in § 44-9-11. As we noted above, First Bank's attorney filed an affidavit in the Superior Court, indicating that his review of the Blackstone commission's records revealed that the commission sent notice of its tax sale to Tomasetti and Suburban only. This notice did not comport with constitutional guarantees of due

process with regard to the mortgagees, and therefore, we determine that the sale is void.

We recently affirmed a Superior Court judgment voiding a tax sale of which the record owner had not received notice. *See Williams* v. *City of Providence*, No. 93-353-A. (R.I., filed April 14, 1994) (mem.). Additionally, courts in several jurisdictions have held or acknowledged the rule that the failure to serve an interested party with notice of a tax sale invalidates that sale with respect to all interested parties, despite the fact that at least one of the parties did receive legal or actual notice of the proceedings. *See* Nora A. Uehlein, Annotation, *Right of Interested Party Receiving Due Notice of Tax Sale or of Right to Redeem to Assert Failure or Insufficiency of Notice to Other Interested Party*, 45 A.L.R.4th 447, 458, § 4 (1986).

We decline to address Ashness's other arguments because we find that they lack merit. Consequently, the plaintiff's appeal is denied and dismissed, and the judgment appealed from is affirmed. The papers of this case are remanded to the Superior Court.

## APPENDIX F-1

**46-21-52. Notice of tax sale to resident taxpayer.** — (a) If the person to whom the estate is taxed be a resident of this state, the commission shall notify the resident of the time and place of sale, either by registered or certified mail sent postpaid to the resident's last and usual place of abode not less than twenty (20) days before the date of sale or any adjournment thereof, or be left at the resident's last and usual place of abode, or personally served on the resident not less than twenty (20) days before the date of sale or any adjournment thereof, but no notice of adjournments shall be necessary other than the announcement made at the sale.

(b) Persons aged sixty-five (65) years and over or persons suffering from a disability may designate a third party, to whom notice may be sent as required pursuant to this section, by advising the commission of the name and address of the person.

(c) If the estate taxed is a corporation, the notice may be sent either by registered or certified mail to its place of business or left at the business office of the corporation with some person there employed.

## APPENDIX F-2

**44-9-27. Examination of title — Notice to interested parties of foreclosure petition.** — (a) Upon the filing of a petition, the petitioner shall thereafter, at his or her own cost, select, with the approval of the court, a title company or an attorney familiar with the examination of land titles, which company or attorney shall make an examination of the title sufficient only to determine the persons who may be interested in the title, and the petitioner shall, upon the filing of the examiner's report, notify all persons appearing to be interested, whether as equity owners, mortgagees, lienors, attaching creditors, or otherwise, of the pendency of the petition, the notice to be sent to each by registered or certified mail and return of

receipt required. Such other and further notice by publication or otherwise shall be given as the court may at any time order.

(b) The notice, to be addressed "To all whom it may concern" shall contain the name of the petitioner, the names of all known respondents, a description of the land, and a statement of the nature of the petition, shall fix the time within which appearance may be entered, and shall contain a statement that unless the party notified shall appear within the time fixed a default will be recorded, the petition taken as confessed, and the right of redemption forever barred (Form 6).

## APPENDIX F-3

**44-9-30. Decree barring redemption.** — If a default is entered under § 44-9-28, or if redemption is not made within the time and upon the terms fixed by the court under § 44-9-29, or if at the time fixed for the hearing the person claiming the right to redeem does not appear to urge his claim, or if upon hearing the court determines that the facts shown do not entitle the person to redeem, a decree shall be entered which shall forever bar all rights of redemption.

## APPENDIX F-4

**44-9-12. Collector's deed — Rights conveyed to purchaser — Recording.** — The collector shall execute and deliver to the purchaser a deed of the land, stating the cause of sale, the price for which the land was sold, the places where the notices were posted, the name of the newspaper in which the advertisement of the sale was published, and the residence of the grantee. The deed shall convey the land to the purchaser, subject to the right of redemption. The title thus conveyed shall, until redemption or until the right of redemption is foreclosed as hereinafter provided, be held as security for the repayment of the purchase price, with all intervening costs, terms imposed for redemption, and charges, with interest thereon, and the premises conveyed, both before and after

either redemption or foreclosure, shall also be subject to and have the benefit of all easements and restrictions lawfully existing in, upon, or over the land or appurtenant thereto. The deed shall not be valid unless recorded within sixty (60) days after the sale. If so recorded it shall be prima facie evidence of all facts essential to the validity of the title thereby conveyed. Except as otherwise provided, no sale hereafter made shall give to the purchaser any right to either the possession, or the rents, or profits of the land until the expiration of one year after the date of the sale, nor shall any sale obviate or transfer any responsibility of an owner of property to comply with any statute of this state or ordinance of any municipality governing the use, occupancy, or maintenance or conveyance of property until the right of redemption is foreclosed.

## APPENDIX F-5

**44-9-31. Contest of validity of tax title** — If a person claiming an interest desires to raise any question concerning the validity of a tax title, the person shall do so by answer filed in the proceeding on or before the return day, or within such further time as may on motion be allowed by the court, or else be forever barred from contesting or raising the question in any other proceeding. He or she shall also file specifications setting forth the matters upon which he or she relies to defeat the title; and unless the specifications are so filed, all questions of the validity or invalidity of the title, whether in the form of the deed or proceedings relating to the sale, shall be deemed to have been waived. Upon the filing of the specifications the court shall hear the parties, and shall enter a decree in conformity with the law on the facts found.

## APPENDIX F-6

**44-9-28. Order as to parties in default.** — After the return day fixed, to be at least twenty (20) days after the time of the actual issuance of notice, the court shall, if satisfied that the notice has been properly given, on motion of the petitioner enter an order defaulting all persons, failing to appear, and decreeing that the petition as to them be taken as confessed (Form 8).

## APPENDIX F-7

**44-9-11 Notice to mortgagees and other parties in interest.** — In case the collector shall advertise for sale any property, real, personal, or mixed in which any person other than the person to whom the tax is assessed has an interest, it shall not be necessary for the collector to notify the interested party, except mortgagees of record who shall be notified by the collector either by registered or certified mail sent postpaid to the last and usual place of abode or place of business of the mortgagee, not less than twenty (20) days before the date of sale or any adjournment thereof, or be left at his or her last and usual place of abode, or personally served on him or her, not less than twenty (20) days before the date of sale or any adjournment thereof, but no notice of adjournments shall be necessary other than the announcement made at the sale. The posting and publication of the notice of the time and place of sale in the manner provided by § 44-9-9, shall be deemed sufficient notice to all other interested parties. This provision shall apply to all taxes levied prior to and subsequent to 1896.

## APPENDIX F-8

**46-21-23. Assessments against users with direct connections.** — The commission may similarly assess such charges against any person, firm, or corporation, other than a municipality, which has a direct connection with the Blackstone Valley sewer district project, and may collect all those charges in the same manner in which taxes are collected by municipalities with no additional charges, assessments, or penalties other than those provided for in chapter 9 of title 44; provided, however, that if the person, firm, or corporation also makes use of the sewer system of a municipality, the charges assessed by the commission against the person, firm, or corporation shall be equitably apportioned to avoid overlapping assessments. All unpaid charges shall be a lien upon the real estate of the person, firm, or corporation.

## APPENDIX G

STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT

PM 91-7830

ROBERT E. ASHNESS
*v.*
JOYCE TOMASETTI, *et al.*

### ORDER STAYING EXECUTION OF JUDGMENT AND FORECLOSURE PENDING RESOLUTION OF WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

This matter came before the Court on August 4, 1994 upon the motion of the petitioner, Robert E. Ashness, for an Order of this Court staying *pendente lite* any foreclosure and execution based on the judgment entered by this Court dated May 4, 1993 and affirmed by the Supreme Court of the State of Rhode Island on June 22, 1994.

By agreement of the parties, it is hereby

ORDERED, as follows:

1. The petitioner's motion is hereby granted; and

2. Foreclosure and execution on the subject mortgage and premises is stayed pursuant to R.I.G.L. § 9-25-4 for a period of six months pending the filing and determination of the petitioner's application for writ of certiorari to the Supreme Court of the United States of America, or until further agreement of the parties or order of the Court.

ORDER:
s/ Robert Johnson
8-4-94

ENTER:
s/ Ronald R. Gagnon, J.
4 Aug. 94

Presented by:

s/ JPM

JAMES P. MARUSAK (#2470)
GIDLEY, SARLI & MARUSAK
170 Westminster Street, Suite 500
Providence, RI 02903
(401) 274-6644

CERTIFICATION

TO: WILLIAM F. HAGUE, JR., ESQ.
DICK & HAGUE, LTD.
1239 Hartford Avenue, Suite 3A
Johnston, RI 02919-7137

ROBIN E. FEDER, ESQ.
Special Assistant Attorney General
72 Pine Street
Providence, RI 02903

I hereby certify that I mailed a true copy of the within Order to the above-named counsel on the 4th day of August, 1994.

s/ REGINA FLANAGAN

/rf